Supreme Court, U. S.
FILED
AUG 22 1996
CLERK

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No. 96-35

In The

Supreme Court of the United States

October Term, 1995

KATHY DOOLEY, Individually and as Administratrix of the Estate of Bruce Dooley, Deceased, and as Next Friend of Isaac Dooley and Dawn Dooley,

Petitioners,

v.

INTERNATIONAL SAFETY INSTRUMENTS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The parties are correctly named in the caption. Respondent International Safety Instruments, Inc., is a subsidiary of Precision Hydro-Testing, Inc. Respondent has no subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully opposes the petition for writ of certiorari. Although it is difficult to put a finger on what petitioners are trying to say, what they appear to be saying is not consistent with either state or federal law, or with the factual record of this case.

The judgment below, which awards summary judgment to the respondent on petitioners' products liability claim, is perfectly conventional and well within the standards of established law. The judgment is correct because petitioners can prove neither that the product malfunctioned nor proximate cause. Petitioners' convoluted argumentation about a supposed *Erie* problem is spurious because the federal and state standards for awarding summary judgment are virtually the same. Petitioners demonstrate no important question on this or any other issue. They also misstate Mississippi law regarding both products liability and opinion testimony.

STATEMENT OF THE CASE

This case involves an unexplained and ultimately unexplainable industrial accident. Petitioners' decedent, Bruce Dooley, lost his life when he fell down a ladder while attempting to inspect a flare line clamp at an oil refinery. What caused Dooley to fall will never be known with any degree of certainty. He may have lost his footing through inadvertence or fatigue. He may not have activated his air pack. He may have activated his air pack and then turned it off. The evidence is simply inadequate to rule out any of a number of possibilities.

Petitioners' effort to make a case against respondent thus required at least two wholly speculative steps. First, petitioners were required to speculate about the immediate cause of the fall. On this point, petitioners originally alleged that Dooley was poisoned by hydrogen sulfide gas. Since abandoning that theory, petitioners have claimed only that Dooley's fall was the result of a lack of air.

It is undisputed that Dooley was misusing an air pack sold by respondent at the time he was killed. Dooley was undisputedly using the air pack for a purpose for which it was not intended, and he was doing so in violation of specific instructions and warnings given by his supervisor. However, petitioners have theorized that any lack of air resulted not from Dooley's undeniable misuse of the air pack, but rather from a malfunction in the air pack.

The air pack targeted by petitioners' theory is an emergency-escape device called an ELSA-5, manufactured by respondent. The ELSA-5 provides a 5-minute supply of air to an unstructured, sack-like hood that is worn over the head. The ELSA-5 is designed to be donned quickly in emergencies to provide fresh air to the wearer while he or she escapes from an area that suddenly and unexpectedly has become hazardous.

The ELSA-5 is *not* designed or intended to be worn as a protective device by persons who are preparing to enter into areas of known or suspected hazard. Devices designed for that quite different purpose have a design that is significantly different from the design of the ELSA-5. Among other things, they are tightly fitting and

pressurized. One such device is the Scott Air Pack, the device that Dooley was instructed to wear during the operation that led to his death.

It is undisputed that Dooley was using an ELSA-5 improperly and against the instructions of his supervisor, Cemore "Buddy" Abney. The job required Dooley to climb a ladder to a platform near the flare line clamp and then use a device designed to detect hydrogen sulfide gas. At a safety meeting that morning, Abney instructed Dooley to use a Scott Air Pack for the job.

After the meeting, Dooley and Jeff Scott, who was assigned to assist Dooley, went to the control room and picked up an ELSA-5. Thereafter Abney specifically warned them that "the ELSA-5 was not suitable for the job and that a Scott Air Pack should be used instead" and specifically reminded them that the ELSA-5 "was to be used for emergency purposes only." Dooley used the ELSA-5 anyway.

Scott was the only eyewitness to the accident. According to Scott, Dooley donned the ELSA-5 and put the plastic hood over his head before climbing the ladder to check the flare line. Scott recalled hearing a hissing sound for a few seconds before Dooley began climbing the ladder, but he did not see Dooley open the air valve and did not know whether the unit was on or off when Dooley started up the ladder. He could not recall how Dooley was wearing the unit.

Wearing the ELSA-5, Dooley climbed the ladder to the platform to check the flare line. Dooley fell as he started to climb back down the ladder from the platform.

Scott reached Dooley first and removed the plastic hood of the ELSA-5 from Dooley's head. Scott did not recall hearing any air flowing from the unit at that time. Scott stated that he did not turn the unit off.

Thereafter, the ELSA-5 was found to be in the full "off" position and full of air. Subsequent tests showed the ELSA-5 to be working perfectly.

Petitioners assert that the ELSA-5 is defective because it is physically possible to cut off the flow of air to the hood by forcing an extreme bend in the air hose, the way one can intentionally and forcibly put a kink in a water hose to cut off the water. Contending that the air hose should have been impossible to force to a close, petitioners speculate, without any evidentiary or scientific basis, that Dooley unknowingly was wearing the ELSA-5 in a manner that caused such an extreme bend in the air hose. They speculate further that when Dooley recognized he was not getting enough air, he mistakenly turned the air off altogether.

Numerous legal problems with petitioners' expert's purported opinion to this effect were pointed out below. Among other things, it is clear that the expert endorsed the theory without inspecting or testing the ELSA-5 in question. In addition, the theory presupposes that it is physically possible to wear the ELSA-5 in a manner that could force the air hose into the necessary extreme bend, when the evidence suggests that even the most bizarre ways imaginable of wearing the device would not produce a bend sufficient to cut off the air flow. The theory presupposes further that Dooley was wearing the ELSA-5 in some such bizarre manner, when there is absolutely no

evidence that he was. Further still, petitioners' theory presupposes that Dooley could have turned off the air flow of the ELSA-5 without knowing that he had done so, when the evidence shows that, among other things, the activated air flow was plainly audible.

Furthermore, petitioners' speculative theory is simply impossible to reconcile with the undisputed fact that the ELSA-5, which was certified to hold only five minutes of air, was found to be fully charged after the accident, indicating it had never been turned on for more than a few seconds. The conclusion is unavoidable that Dooley was attempting to wear the ELSA-5 without activating it, in the apparent belief that he would have time to do so if he detected the presence of gas. Very possibly, Dooley was trying to avoid turning in a "used" ELSA-5, since in so doing he would have called attention to the fact that he had violated procedures and specific instructions about the safety equipment required for the job.

Thus even if it could be proved that lack of air caused Dooley to fall (this fact is also uncertain), the evidence in this record plainly could not establish petitioners' speculative defect as the cause of the presumed lack of air rather than Dooley's undeniable misuse of the product. Respondent was entitled to summary judgment under any conceivable theory of products law.

REASONS FOR DENYING THE WRIT

This case does not present a question worthy of review by this Court. The decision below is well within

the parameters of established law and perfectly reasonable in light of the evidence. Petitioners' assertions to the contrary depend on misstatements of law, of fact, or of both.

Petitioners' designated question, Petition at i, is less than clear, but in essence, it accuses the Fifth Circuit of applying a summary judgment standard that is more favorable to defendants than the standard applied by the Mississippi Supreme Court. This alleged procedural difference is said to have affected the outcome of this case to an extent that raises important federal concerns.

Petitioners' question is spurious because there is no conflict between the federal summary judgment standard and the Mississippi standard. Indeed, the two standards seem indistinguishable. In addition, petitioners' argument about a supposedly important conflict among the circuits shows no relevant conflict at all.

A. The Mississippi Standard for Granting Summary Judgment is Based on the Federal Standard and Is Indistinguishable From It.

Despite what petitioners imply, there is no material distinction between the summary judgment standards applied by the Fifth Circuit and the Mississippi Supreme Court. To the contrary, for practical purposes, Mississippi has adopted the federal rule.

The summary-judgment standard applied by Mississippi courts is established by the Mississippi Rules of Civil Procedure. Mississippi's rules, which were adopted by the Mississippi Supreme Court effective January 1,

1982, are based on the Federal Rules of Civil Procedure, and they track the federal rules almost word for word. There is no material difference between the two versions of Rule 56, which governs summary judgment.

Moreover, acknowledging the source of the rules and the goal of consistency, the Mississippi Supreme Court has repeatedly stated that federal interpretations of the federal rules should be regarded as persuasive in interpreting the Mississippi rules. "We have consistently and almost routinely said that . . . the federal construction of the counterpart rule will be 'persuasive of what our construction of our similarly worded rule ought to be.' " *Bruce v. Bruce*, 587 So.2d 898, 903 n.5 (Miss. 1991) (citing a list of examples, including Rule 56).

One of the earliest cases to interpret the Mississippi rules addressed summary judgment. *Brown v. Credit Center, Inc.*, 444 So.2d 358, 364 n.1 (Miss. 1983). In *Brown*, the Mississippi Supreme Court effectively endorsed the federal standard:

> We observe here in relevant part the wording of our Rule 56 is identical to the wording of Rule 56 of the Federal Rules of Civil Procedure. Accordingly, we regard authoritative constructions of Federal Rule 56 as persuasive of what our construction ought to be.

The court has continued to cite this standard for summary judgment. *See, e.g., Strantz v. Pinion*, 652 So.2d 738, 742 (Miss. 1995) (citing *Brown*); *Page v. Wiggins*, 595 So.2d 1291, 1295 (Miss. 1992) ("In construing Miss.R.Civ.P. 56, it is appropriate for this Court to rely on federal law.").

Plainly there is no "direct collision" between the federal and state standard for granting summary judgment as petitioners contend. Petitioners obviously struggle to suggest the contrary. The convolutions of pages 10 through 13 and 20 through 26 of the Petition reflect the argument's lack of substance. Petitioners' assertion that the Fifth Circuit is "semaphoring" its supposedly improper standard is tellingly strange. Petition at 13.

No doubt, petitioners are unhappy with the judicial temperament of the judges of the Fifth Circuit, whose independence of mind is plainly not to petitioners' liking. But independence of mind is not error.

In sum, the writ should be denied because the question presented has no basis in law.

B. Despite Their Assertions, Petitioners Demonstrate Neither a Relevant Nor an Important Split of Authority.

Petitioners purport to show an important conflict among pertinent federal cases, but their citations of authority are either beside the point, or misstated, or both.

Petitioners rely principally on an attack on the Fifth Circuit's decision in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*). But *Shipman* predates by more than a decade Mississippi's adoption of its rules of civil procedure and Mississippi's subsequent express embrace of federal interpretations of the rules. Thus whatever else

Shipman may have done, it plainly could not have created, nor can it now represent, a divergence in the summary judgment procedures applied by the Fifth Circuit and the State of Mississippi. *Shipman* was not even a summary judgment case. It dealt instead with the standard of review for jury verdicts. *Shipman* was not relied upon, or even mentioned, in the opinions below.

Thus *Shipman* does not represent a "direct collision" between Mississippi law and federal law in any sense, let alone in the way petitioners suggest. Similarly, petitioners' reliance on *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749, 100 S.Ct. 1979, 64 L.Ed.2d 659 (1980), and similar cases, is completely beside the point.

The purported division among the courts of appeal to which petitioners point, Petition at 9 n.5, misses the mark for the same reason: whatever the division, it cannot matter here, where the state and federal standards are indistinguishable. Moreover, the conflict among the courts of appeal, if it exists at all, does not appear important. The authorities rather suggest substantial uniformity among both the courts and the commentators. *See, e.g., Mayer v. Gary Partners and Co., Ltd.*, 29 F.3d 330 (7th Cir. 1994); 9A Wright & Miller, *Federal Practice and Procedure* § 2525 (1995).

C. Much of Petitioners' Argument Appears Beyond the Scope of the Question Presented. The Points Made Are Not Worthy of a Writ In Any Event.

The remainder of petitioners' argument is so far removed from the apparent point of the question presented, Petition at i, that it ought to be disregarded, first, as a violation of this Court's Rule 14(1)(a). But the points are not worthy of a writ in any event.

1. Petitioners' extreme view of Mississippi products law is unfounded.

At pages 13 through 20, petitioners appear to argue that the lower courts either misunderstood or misapplied Mississippi products law. Even if it otherwise had some merit, the point would not be worthy of a writ. But petitioners' argument lacks legal merit altogether, because it misstates the law.

Petitioners assert that Mississippi adheres to an extreme view of *res ipsa loquitur*, or something analogous, in products liability cases and that their evidence should have been found sufficient for trial under that standard. But none of the cases petitioners cite would justify permitting a trial on the speculative evidence presented below.

For example, the *Daniels* case, on which petitioners primarily rely, Petition at 14, is easily distinguished from this case. *Daniels v. GNB, Inc.*, 629 So.2d 595 (Miss. 1993). In *Daniels*, the product, a new car battery, obviously malfunctioned: it exploded. Thereafter the battery was

unavailable for testing. The eyewitness testimony of the injured plaintiff was sufficient to eliminate explanations for the explosion other than a defect in the battery. *Id.*

The situation here is virtually the opposite of *Daniels*. Here the product was available for testing, and testing showed that the ELSA-5 was working perfectly. Thus petitioners must rely on speculation to suggest that the ELSA-5 malfunctioned at all, and they cannot rule out other, equally or more plausible explanations for the accident.

Daniels in no way substantiates petitioners' wild-eyed view of Mississippi products law. The truly radical sweep of petitioners' view becomes apparent at page 19 of the Petition, where petitioners argue, in effect, that Mississippi has shifted the burden of proof in products cases to the defendant. That petitioners offer no support for this proposition is understandable. The assertion goes far beyond anything the Mississippi Supreme Court has contemplated.

The writ should be denied with regard to any issue bearing on the particularities of Mississippi products law for the additional reason that the law applicable to this case is now no longer the law of Mississippi. In 1993, the Mississippi Legislature adopted a broad reformulation of products liability law as part of a tort reform measure. 1993 Miss. Laws ch. 302 § 1, *codified at* Miss. Code Ann. §§ 11-1-63 (Supp. 1995). The substantive aspects of the reform measure apply to cases filed on or after July 1, 1994. 1993 Miss. Laws ch. 302 § 5. The statute does not apply to this case. The cases on which petitioners rely all predate the statute. Thus petitioners are asking this Court

to waste its time on a Mississippi common-law scheme that is obsolete.

2. Petitioners' extreme view of Mississippi law regarding the admission of expert opinion is unfounded.

At Petition pages 26 and following, petitioners engage in an intemperate attack on the Fifth Circuit panel for supposedly failing to show proper deference to the opinion of petitioners' expert. Petitioners make no discernable effort to relate this diatribe to the question presented; the argument ought to be disregarded on that basis alone. Petitioners also make little or no effort to articulate a *legal* question; instead they primarily attack the integrity of the individual judges. That sort of thing obviously does not merit further consideration by this Court.

To the extent any legal point at all may be inferred from this aspect of petitioners' argument, the point misstates Mississippi law and is meritless. Thus, if petitioners mean to imply that Mississippi law imposes no limit whatsoever on what an expert may say and that *any* expert "opinion" on liability will therefore be sufficient to permit a jury verdict in Mississippi courts, they are simply wrong.

In Mississippi, as in federal law, the basic test for admissibility of opinion testimony is found in the rules of evidence. The Mississippi Rules of Evidence, adopted in 1986, are based on the Federal Rules of Evidence. The

rules on opinion testimony follow the corresponding federal rules almost verbatim. *Compare* Article VII, Miss.R.Evid., *with* Article VII, Fed.R.Evid.

Moreover, the Mississippi Supreme Court has plainly never stripped the trial courts of authority to exercise oversight of expert testimony, as petitioners appear to suggest. On the contrary, trial courts are instructed to exercise oversight and to ensure that proffered opinions meet the test of the rules. *See, e.g., Goforth v. City of Ridgeland*, 603 So.2d 323, 329 (Miss. 1992) ("before a qualified expert's opinion may be received, it must rise above mere speculation"); *Hart v. State*, 637 So.2d 1329, 1338-39 (Miss. 1994) ("the abolition of the ultimate issue rule does not result in the admission of all opinions").

In addition, Mississippi has consistently recognized that expert testimony based on an inadequate examination, or on assumed facts which are later disproved, must give way to proof based on actual observations or measurements. *Gulf Ins. Co. v. Provine*, 321 So. 2d 311, 315 (Miss. 1975); *Johnson v. Ferguson*, 435 So. 2d 1191, 1195-96 (Miss. 1983); *Russell v. Mississippi Cent. R.R. Co.*, 125 So. 2d 283, 285-86 (Miss. 1960).

Thus, there is plainly no mandate in Mississippi law that a trial court defer to an expert's conclusory "opinion" that a plaintiff has a claim. There is no reason to believe that the outcome of this case would have been different under the Mississippi Rules of Evidence.

3. The judgment below also rests on lack of proof of proximate cause.

The writ should be denied for the additional reason that the judgment below stands on the independent basis of lack of proximate cause. Proximate cause is an essential element of a products case. *Daniels*, 629 So.2d at 600. Mississippi applies conventional tests of proximate cause. *See, e.g., Holliday v. Pizza Inn, Inc.*, 659 So. 2d 860, 866 (Miss. 1995), *quoting Mississippi City Lines v. Bullock*, 194 Miss. 630, 13 So.2d 34, 36 (1943). Thus even if petitioners could show some specially favorable Mississippi products liability law, respondent would still be entitled to judgment on lack of proximate cause.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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